Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-998

RODNEY A. LOGAL, Petitioner

v.

WILLIAM C. CRUSE,
JERRY W. COOK,
BILLY D. MARTIN,
RANDALL CZEKAJ, Respondents

Petition for a Writ of Certiorari to the
Supreme Court of Indiana

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IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1977

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No._____

RODNEY A. LOGAL, Petitioner

v.

WILLIAM C. CRUSE,
JERRY W. COOK,
BILLY D. MARTIN,
RANDALL CZEKAJ, Respondents

Petition for a Writ of Certiorari to the Supreme Court of the State of Indiana

Rodney A. Logal, Petitioner prays that a Writ of Certiorari issue to review the judgments of the Supreme Court of Indiana entered in the above case on October 13, 1977.

OPINIONS BELOW

The Memorandum opinion of the Court of Appeals of Indiana, Third District was issued on September 9th, 1976 and is unreported and copies thereof are appended to this petition in the Appendix at

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pp. 21-22. The opinion of the Court of Appeals of Indiana, Third District in the companion case is reported in ___Ind.App.___, 338 N.E.2d 309 and is found in the Appendix at pp. 11-20. The Court of Appeals of Indiana denied Rehearing on both appeals without opinion on December 1, 1976 and February 23rd respectively. The Supreme Court of Indiana consolidated both appeals on April 18th, 1977 and granted transfer with an opinion on October 13th 1977 which is reported at ___Ind.___, ___N.E.2d___ and is found in the Appendix at pp. 29-42.

JURISDICTION

The opinion of the Supreme Court of Indiana was made and entered on October 13th, 1977 and copies thereof are appended to this petition in the Appendix at pp. 29-42. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

In a suit for personal injury, the respon-

dents sought, under Indiana Trial Rule 30, to take the discovery deposition of the petitioner's doctor. The petitioner had previously signed a medical authorization. Without the petitioner's knowledge or consent, his attorney of record opposed the proceeding. Respondents filed a motion to compel discovery, which was granted. The petitioner's counsel refused to comply and thwarted the deposition. The Trial Court, upon motion, awarded one thousand, two hundred dollars as sanctions, pursuant to Indiana Trial Rule 37, to be paid within thirty days. At the expiration of that time, the case was dismissed with prejudice

After discovering the dismissal, the petitioner secured new counsel and attempted to secure reinstatement, pursuant to Indiana Trial Rule 60(B) and 41(F), which was denied. Two appeals were perfected, one of which was dismissed, and the other affirmed by the Indiana Court of Appeals. Rehearing on both appeals was denied by the Court of Appeals. The Supreme Court of Indiana granted

transfer, modified the procedure for Trial Rule 60(B) motions, and affirmed both the dismissal with prejudice and the Trial Court's refusal to reinstate. The questions presented are:

1. Whether the provisions of Indiana Trial Rule 37, providing sanctions on failure to make discovery, must be read and applied within the framework of the Constitutional protections and guarantees provided the petitioner under the 5th and 14th Amendments to the Constitutions of the United States.

2. Whether the dismissal and subsequent refusal to reinstate the petitioner's cause of action, under the circumstances, violated the petitioner's Constitutional rights under the 5th and 14th -- -- Amendments to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND TRIAL RULES INVOLVED

The 5th Amendment to the Constitution of the United States provides, in part, as follows:

> "No person shall be held to answer.... nor be deprived of life, liberty, or property without due process of law;...."

The 14th Amendment to the Constitution of the United States, Section 1, reads, in part, as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside....Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Indiana Trial Rule 37 reads in pertinent part as follows:

> (A) Motion for order compelling discovery. Upon reasonable notice to the other parties and all persons affected thereby, a party may apply for an order compelling discovery as follows: ....
>
> (B) Sanctions--Contempt, damages and default. To avoid abuse of discovery proceedings and to secure enforcement or protective proceedings under the discovery provisions of these rules or upon motion and notice by a party, witness or person to any persons affected thereby: ....
>
> (2) The court may allow expenses, including reasonable attorney's fees, incurred by a pary, witness or person, against a party, witness or person, responsible for

unexcused conduct that is: ....

(c) in bad faith and abusively resisting or obstructing a deposition, interrogatories, production of evidence, inspection, examination, request, question, enforcement order, subpoena, protective order or any other remedy under the discovery provisions of these rules.

(4) The court may enter total or partial judgment by default or dismissal with prejudice against a party who is responsible under subdivision (B)(2) of this rule if the court determines that the party's conduct has or threatens to so delay or obstruct the rights of the opposing party that any other relief would be inadequate.

Indiana Trial Rule 41(F) reads as follows:

Reinstatement of dismissal. For good cause shown and within a reasonable time the court may set aside a dismissal without prejudice. A dismissal with prejudice may be set aside by the court for the grounds and in accordance with the provisions of Rule 60(B).

The pertinent provisions of Trial Rule 60(B) may be found in the Appendix in Judge Staton's dissent on pp. 16-17.

STATEMENT OF THE CASE

On May 14th, 1969, the petitioner was involved in a chain-reaction bype collision near the

intersection of Cline Avenue and I-94 in Hammond Lake County, Indiana. On May 6th, 1971, the petitioner filed a lawsuit in Lake Superior Court which was subsequently venued to Porter County, Indiana. The petitioner, at one time, was offered the sum of $25,000.00 to settle his claims.

After the initiation of the lawsuit, the respondents commenced discovery proceedings. The petitioner had previously executed a medical release and the deposition of Dr. Saavedra, the petitioner's physician was scheduled for August 7th, 1972. That deposition was cancelled and re-noticed for the 26th day of January, 1973. On January 25th, at approximately 3:30 P.M. the respondent Martin's attorney received a call from an individual who identified himself as Mr. Brown from Mr. Crumpacker's office who stated that his office would file objections to the taking of the depostion. The respondent's attorney indicated that he would proceed with the deposition until he received a protective order

signed by the court. The same date, Dr. Saavedra's office was contacted (by a person believed to be Mr. Brown) and advised not to proceed with the deposition because petitioner's counsel had filed a Motion to Quash.

At the time and place of the deopostion, Mr. Brown, from Attorney Crumpacker's office, and who was not a lawyer licensed to practice law, appeared and again instructed and advised Dr. Saavedra not to proceed with the deposition in question. At that point, Dr. Saavedra refused to testify. On March 6th the respondent Martin filed a Motion to compel Discovery under Indiana Trial Rule 37 and asked for sanctions. This Motion was set for hearing several times and continued by Attorney Crumpacker. The hearing was held on October 26th, 1973, with all parties present except respondent's attorney. The court's order granting discovery and imposing sanctions may be found in the Appendix at pp. 1-2. The order provided that the sanctions were to be paid within

thirty days and when they were not paid, the court entered an order dismissing the petitoner's cause of action with prejudice. That order may be found in the Appendix at pp. 2-3.

At no time was the petitioner advised of the orders or proceedings against him. Upon learning of the dismissal, approximately seven months later, the petitioner secured new counsel, filed a motion pursuant to Indiana Trial Rules 41(F) and 60(B) to reinstate his cause of action. That motion and supporting affadavits may be found in the Appendix at pp. 5-9. As indicated in the petition and affadavit, Logal was not aware of the proceedings, was advised by his former counsel, Crumpacker, that things were proceeding normally, that he did not authorize his attorney's conduct, and that he was willing to pay the sanctions to secure reinstatement of his cause of action. That petition was denied and the order may be found in the Appendix at pp. 3-4.

The constitutional questions concerning the

5th and 14th Amendments were raised by Crumpacker in a motion to correct errors and may be found in the Appendix at pp. 10. The Court of Appeals did not address those issues in its opinion and they were preserved by petitioner's new counsel in Petitions for Rehearing and Transfer. The Court of Appeals denied rehearing without opinion and the Supreme Court of Indiana granted transfer, modified the procedure to Trial Rule 60(B) motions, and affirmed the actions of the Trial Court in dismissing the cause of action and denying reinstatment, but continued to ignore the constitutional questions raised. All three opinions may be found in the Appendix.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because the Constitutional questions raised by the petitioner, have never been addressed by the trial court, the Court of Appeals or the Supreme Court of the State of Indiana. The questions raised have been referred to and were approached in Hovey v. Elliot

167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215; Hammond Packing Company v. State of Arkansas, 212 U.S. 322, 29 S.Ct. 270, 53 L.Ed. 530; and Link v. Wabash Railroad Company, 370 U.S. 626, 8 L.Ed.2d 734, 82 S.Ct. 1386.

The right of the trial court to enforce discovery and provide for the orderly development of lawsuits versus the constitutional rights of unwitting parties not directly responsible for misconduct must be weighed. Trial Rule 37 provides for severe sanctions which may be imposed by a trial court in the event a person fails to comply or attempts to abuse the discovery process. However those sanctions must be applied in a constitutionally proper manner. This is not to say that a client may not be bound by the actions of his attorney or bound by notice to his attoney in most matters. However, when that attorney abandons the normal procedures of the law and becomes charged with misconduct, unethical conduct, or, as here an abuse of the recognized discovery process, so as to

invite sanctions and dismissal, the client is entitled to additional constitutional protection to insure that his rights and property are protected. (The disciplinary proceedings against Owen Crumpacker for unethical conduct and mis-conduct remain pending at this time)

Since the constitutional issues raised were not addressed by any of the lower courts, their decisions cannot be addressed within the framework of this petition.

This Court, however, has faced the issue of dismissal for failure to prosecute under Federal Rule of Civil Procedure 41(b). It held in a 4-3 decision in Link v. Wabash Railroad Company, supra, that such dismissal was not constitutionally prohibited. However, this petition embraces two additional points, not present in Link, which carry it beyond the proscriptions of the 5th and 14th Amendments.

First, the trial court entered a monetary award against the petitioner without any form of

process or notice, except to his attorney, whom the court acknowledged, had already acted in bad faith.

Second, the petitioner, after becoming aware of the situation, filed a petition to reinstate his cause of action, under Indiana Trial Rule 60(B) which was denied. In Link, supra, Mr. Justice Harlan seems to have relied upon the fact that Link never sought to avail himself of the escape hatch provided by Trial Rule 60(b), which he felt rendered the lack of notice inconsequential. With the denial of the petitioner's Rule 60(B) motion, the lack of notice to the petitioner clearly leads to the loss of a valuable property right without due process.

Both the petitioner's and the respondent's rights to adequate discovery procedures and the court's power to enforce those procedures are acknowledged. However, the Federal Court system has consistently applied sanctions against the party who is directly responsible for hindering those procedures. Sanctions are imposed against the of-

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fending attorney for his conduct, not to be taxed as costs nor charged against the client.

The fundimental rule that notice to an attorney constitutes notice to the client is unreasonable in Trial Rule 37 sanctions by the very nature of the proceeding. To assume that the attorney, having been sanctioned for his misconduct, will advise the client of the pending award and the threat of dismissal, completely ignores the previous conduct of the attorney which generated the sanctions. If he had followed the rules and obeyed the orders issued by the court, the sanctions would never have been awarded.

It is not unreasonable to require a direct notice to a client that a threat of dismissal hangs over his head for the conduct of his attorney. Such a rule would protect the client's basic constitutional rights under the 5th and 14th Amendments concerning fundamental notice and due process prior to the loss of property.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

SUPREME COURT OF THE UNITED STATES

October Term, 1977

RODNEY A. LOGAL,
Petitioner

v.

WILLIAM C. CRUSE,
JERRY W. COOK,
BILLY D. MARTIN,
RANDALL CZEKAJ,
Respondents

On Writ of Certiorari

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ORDERS APPEALED FROM

COURT OF APPEALS
NO. 3-675 A 106

The Trial Court on or about the 26th day of October, 1973, entered the following order, omitting formal parts:

> Comes now the defendant, William C. Cruse, by counsel, Karen Hughes. Comes now the defendant, Billy D Martin, by counsel, Fred Stults, Jr., (sic.) and comes now defendants William Cruse and Randall Czekaj by counsel Rudy Lozano. Comes now Dr. Bernard Saavedra in person and by counsel, Martin H. Kinney. The plaintiff, Rodney A. Logal does not appear in person or by counsel. It is now shown to the Court that Plaintiff's counsel has been notified by ordinary mail of today's hearing.
>
> Cause submitted to court. Argument now heard on Motion Compelling Discovery and for Sanctions Against Plaintiff and Dr. Bernardo Saavedra.
>
> Court now being advised in the premises grants Defendant's Motion to Take the Deposition of Dr. Saavedra.
>
> The Court further finds that defendants have substantially complied with the Indiana Rules of Court in regard to the taking of the deposition of Dr. Saavedra and the Court finds that the Plaintiff through its attorney has substantially failed to comply with the Indiana Rules of Civil Procedure and that said failure has not been in good faith. Pursuant to Indiana Trial Rules, the Court does now grant

to the Defendants sanctions against the plaintiff, Court further grants to the counsel of various defendants, reasonable attorney's fees in the amount of $1,200.00 to be divided among defendants' counsel by agreement or upon failing to reach an agreement, the Court will make a division of said attorney fees and will consider Affidavits by counsel prior to said division.

IT IT FURTHER FOUND AND ORDERED that said $1,200.00 is to be paid into the Clerk's office on or before November 7, 1973 by plaintiff or plaintiff's counsel. Should plaintiff or plaintiff's counsel fail to comply with said sanctions on or before November 7, 1973, the Court will enter an order of dismissal in this cause with prejudice and direct costs against the plaintiff.

ALL OF WHICH IS ORDERED, ADJUDGED AND DECREED by this Court this 26th day of October, 1973.

/s/B.W. Douglas, Judge
PORTER SUPERIOR COURT

The trial Court subsequently on November 9, 1973, dismissed the appellant's cause of action which order is as follows:

> Plaintiff herein having failed to comply with the sanctions imposed by this Court in the allotted time, the court does now dismiss this cause with prejudice.
>
> ALL OF WHICH IS SO ORDERED, ADJUDGED AND DECREED by this court this 9th day of November, 1973.
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this court that this cause be dismissed for plaintiff's failure to comply with sanctions as ordered by the court.
>
> /s/B.W. Douglas, Judge
> PORTER SUPERIOR COURT

The order denying the Petitioner's Motion to Correct Errors reads, omitting formal parts, as follows:

> The plaintiff's Motion to Vacate or in the Alternative to Correct Errors was heard by the Court on March 14, 1974.
> Plaintiff has failed to submit Memorandum of Brief as directed at that time. The Court now denies Plaintiff's Motion to Correct Errors and Motion to Vacate.
>
> ALL OF WHICH IS SO ORDERED, ADJUDGED AND DECREED this 9th day of April, 1974.
>
> /s/B.W. Douglas, Judge
> PORTER SUPERIOR COURT

COURT OF APPEALS

NO. 3-773 A 120

The Trial Court on or about the 21st day of January, 1975, entered the following order, omitting formal parts:

> Comes now the plaintiff by counsel Mike Muenich

Come now defendants by counsel Karen Hughes, Dale Custer and Sam J. Bernardi. This cause is now submitted to court on Petition to Reinstate filed by plaintiff. Arguments heard on this Petition. Petition to Reinstate is now denied. All of which is ORDERED, ADJUDGED AND DECREED by this Court this 21st day of January, 1975.

/s/B.W. Douglas, Judge
PORTER SUPERIOR COURT

The order denying the Petitioner's Motion to Correct Errors reads, omitting formal parts, as follows:

Comes now the plaintiff, Rodney A. Logal, by counsel, and files Motions to Correct Errors in the within cause of action in the following words and figures, to-wit: (H.I.).

And the court having examined same and being duly advised in the premises, now denies said Motion...."

/s/ B.W. Douglas
JUDGE, PORTER SUPERIOR COURT

(Order entered March 18th, 1975)

STATE OF INDIANA)		IN THE PORTER
)	SS:	SUPERIOR COURT
COUNTY OF PORTER)		
RODNEY A. LOGAL	)	
	)	
Plaintiff	)	
	)	
-vs-	)	CAUSE NO. 71 PSC 1734
	)	
WILLIAM C. CRUSE, et al	)	
	)	
Defendants	)	

PETITION TO REINSTATE

Comes now the plaintiff, by his attorney, Michael L. Muenich, and shows the court:

1. That on or about the 26th day of October, 1973, this court entered a certain order, a copy of which is attached hereto, made a part hereof and marked as Exhibit A, a portion of which granted to the various defendants, sanctions in the form of reasonable attorney fees in the amount of One Thousand Two Hundred Dollars ($1,200.00) which sum was to be paid on or before November 7, 1973.

2. That said order further provided for dismissal on November 7, 1973 for failure to comply with said judgment amount and that said case was,

in fact, dismissed at that time.

3. That pursuant to plaintiff's affidavit, attached hereto, made a part hereof and marked as Exhibit B, Rodney A. Logal was not advised of the sanctions entered against him, was not advised of the dismissal and further, was not kept advised of the status of his proceedings.

4. That pursuant to said affidavit, the plaintiff first became aware of the status of this case in August of 1974.

5. That the plaintiff was not aware of the actions of his counsel and at no time sanctioned or authorized such conduct and further, has, since being advised of the judgment and dismissals entered against him, retained new counsel to protect his interests herein.

6. That the plaintiff did, on or about October 25, 1974, file a request for investigation with Mr. Richard H. Grabham, Executive Secretary of the Indiana State Bar Association, which ivestigation is now pending before the local Bar Association Grievance Committee.

7. That your plaintiff is willing, should the court so order, to tender the sum of One Thousand Dollars ($1,200.00) to the court, pursuant to this Court's Order of October 26, 1973.

8. That pursuant to Trial Rule 41 of the Indiana Rules of Trial Procedure, and Trial Rule 60 of the Indiana Rules of Trial Procedure, your plaintiff now petitions the court for good cause hereinabove set forth to reinstate these proceedings; that this court set a hearing on plaintiff's petition for reinstatement; and for all other just and proper relief in the premises.

/s/Michael L. Muenich
MICHAEL L. MUENICH
Attorney for Plaintiff
5231 Hohman Avenue
Hammond, Indiana 46320

/s/Rodney A. Logal
RODNEY A. LOGAL

Exhibit B

STATE OF INDIANA)
) SS:
COUNTY OF PORTER)

IN THE PORTER SUPERIOR COURT

RODNEY A. LOGAL

-vs-) CAUSE NO. 71 PSC 1734
)
WILLIAM C. CRUSE, et al)
)
Defendants)

AFFIDAVIT

Comes now the plaintiff, Rodney A. Logal and being first duly sworn upon his oath, deposes and says:

1. That he was the plaintiff in a cause of action arising out of an automobile accident on the 16th day of May, 1969 the same being captioned Rodney A. Logal vs. William C. Cruse, et. al.

2. That in connection with such incident, the plaintiff retained Owen W. Crumpacker of Hammond, Indiana to represent him in said cause of action.

3. That your deponent did, from time to time, contact his counsel regarding these proceedings and was advised that the case was proceeding in a normal manner.

4. That in August, 1074, the plaintiff discovered that his case may have been dismissed and sanctions entered against him.

5. that upon investigation, your deponent

determined that his case had been dismissed and udgment entered against him in the amount of One Thousand Two Hundred Dollars ($1,200.00).

6. That at no time prior to making such discovery was the plaintiff aware of sanctions being entered against him or the dismissal of the above captioned cause of action.

7. That at no time prior to August, 1974, was the affiant apprised of the status of the proceedings regaring the various orders and entries of the court subsequent ot August, 1973.

FURTHER YOUR AFFIANT SAITH NOT.

/s/Rodney A. Logal
RODNEY A. LOGAL

Subscribed and sworn to before me, a Notary Public this 10th day of December,1974.

/s/Michael L. Muenich
Notary Public

My commission Expires:
9/1/75

EXCERPTS FROM MOTION TO
CORRECT ERRORS

(5) Plaintiff's cause of action represents a valuable property right, being a chose in action, of which the insurance companies conducting the defenses for and on bahalf of the named defendants were fully aware, said insurance company or companies having previously, offered $25,000 to settle the plaintiff's claim. The dismissal of the case, without notice or hearing, constitutes the deprivation of the plaintiff, Rodney Logal, of his property without due process of law as guaranteed him the the Fourteenth Amendment of the United States Constitution and similar provisions of the Indiana State Constitution.

******

(20) Plaintiff respectfully represents that the award of $1,200, without notice or hearing, constitutes a deprivation of plaintiff's property without due process of law. Plaintiff as unaware of the order and had no opportunity to obtain the $1,200 or to pay it into the clerk's office on or before November 7, 1973.

IN THE
COURT OF APPEALS OF INDIANA

THIRD DISTRICT

RODNEY A. LOGAL, Plaintiff-Appellant v. WILLIAM C. CRUSE, JERRY W. COOK, BILLY D. MARTIN, RANDALL CZEKAJ, and WILLIAM J. MAHAN, Defendants-Appellees	)	No. 3-675 A 106 DECIDED DECEMBER 8, 1975

APPEAL FROM THE PORTER SUPERIOR COURT
HONORABLE BRUCE W. DOUGLAS, JUDGE

ON APPELLEES' MOTIONS TO DISMISS

HOFFMAN, JUDGE.

Defendants-appellees William C. Cruse, Billy D. Martin and Randall Czekaj have filed separate motions to dismiss this appeal, alleging that the trial court was without jurisdiction to enter a judgment. Plaintiff-appellant Rodney A. Logal has not responded to such motions.

The record of this cause discloses that on November 9, 1973, the Porter Superior Court dismissed an action between these parties for the

plaintiff Logal's failure to comply with certain sanctions previously ordered by such court. An appeal was perfected from that judgment and is presently pending in this court as Cause No. 3-73 A 120.

After such appeal was perfected to this court, Logal obtained new counsel who filed in the trial court a "Petition to Reinstate" such action pursuant to Ind. Rules of Procedure Trial Rule 60(B). Such petition was denied. Logal then filed a motion to correct errors directed to the denial of such petition. This motion was overruled and the present appeal was perfected.

-Appellees contend that after the first appeal was perfected by the filing of the record of the proceedings in this court, the trial court lost its general jurisdiction over the cause, and had no jurisdiction to entertain Logal's "Petition to Reinstate." A long line of precendential case law is supportive of this position.

In Westfall v. Wait (1903), 161 Ind. 449, at 451, 68 N.E. 1009, at 1010, our Supreme Court

stated:

> "It seems to be thoroughly settled by the decisions of the American courts that an appeal from a final judgment rendered generally upon the issues in a cause, when properly perfected, carries the whole case embraced within the final adjudication absolutely from the jurisdiction of the trial court to the appellate tribunal. Elliott, App. Proc. 541. The rule is tersely stated in the text of 2 Ency. Pl. & Pr. 327, thus: 'Where an appeal has been perfected, the jurisdiction of the appellate court over the subject-matter and parties attaches, and the trial court has no power to render any further decision affecting the rights of the parties in th cause until it is remanded.' Citing many authorities. In State, ex rel., v. Kolsem, 130 Ind. 435, 14 L.R.A. 566 this court used the following language: 'If the appellees had perfected their appeal, there could be no doubt that the case would have been entirely removed from the jurisdiction of the trial court.'
>
> "at the bottom of the rule is the infeasibility of two courts having authority over the same case at the same time. ***."

Similarly, see: Lake County Department, etc. v. Roth, (1961), 241 Ind. 603, 174 N.E.2d 335;

State v. Gurecki (1954), 233 Ind. 383, 119 N.E.2d 895;

Farmers L. & T. v. Manning et al. (1968),

142 Ind. App. 519, 236 N.E.2d 52;

Kragulac et al. v. Marich et al. (1967), (on petition for rehearing), 142 Ind.App. 529, 549, 236 N.E.2d 58 (transfer denied).

This rule was recently reaffirmed by our Supreme Court in Bright v. State (1972), 259 Ind. 495, 289 N.E.2d 128. In Bright, the appellant had filed an appeal from his conviction, and during the pendency of such appeal returned to the trial court to file a petition for post-conviction relief. Upon the denial of such petition, he filed a second appeal. Our Supreme Court dismissed such subsequent appeal, stating:

> "At the time the appellant filed his motion to correct errors and transcript of record in this Court in the first appeal, the entire cause was removed from the trial court to this Court thereby depriving the trial court of any further jurisdiction over the action. 2 I.L.E. Appeals 231 (1957). We, therefore, hold the appellant was premature in filing his verified motion for post-conviction remedy in the trial court at a time when the same cause of action was pending in this Court on appeal." (At 496 of 259 Ind., at 129 of 289 N.E.2d)

Similarly, in the case at bar when Logal perfected his appeal from the original judgment of dismissal by filing the record of the proceedings

with the clerk of this court, the trial court lost its general jurisdiction of the case. thus, the purported proceedings on Logal's "Petition to Reinstate" in the trial court were a nullity, and this attempted appeal must be dismissed.

The motions to dismiss heretofore filed in this cause are sustained, and this appeal is dismissed.

Appeal dismissed.

GARRARD, J. CONCURS WITH OPINION.

STATION, P.J. DISSENTS WITH OPINION.

GARRARD, J., Concurring

Because of the recent reaffirmance in Bright v. State (1972), 259 Ind. 495, 298 N.E.2d 128, of the doctrine that the trial court loses jurisdiction to further review tis decision after and appeal is perfected and while it pends, I am compelled to concur in the dismissal.

However, I join Judge Staton in believing that while several courts should not be simultaneously engaged in reviewing a decision, some procedure

should be adopted which would protect the losing party's access to the various remedies provided by our codes of procedure and permit consolidation of the issues presented so that a prompt and efficacious determination may be reached.

STATON,P.J. Dissenting

I dissent. Indiana Rules of Procedure, Trial Rule 60(B) permits a motion to be filed within a year after judgment.[1] The Rule provides in part:

> "(B) Mistake--Excusable neglect-- Newly discovered evidence--Fraud, etc. On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order, default or proceeding for the following reasons:
>
> (1) mistake, surprise, or excusable neglect;
>
> (2) any ground for a motion to correct error, including without limitation newly discovered evidence, which by due diligence could not have been discovered in time to move for a motion to correct errors under Rule 59;
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) judgment by default was entered against such party who was served only by publication and who was without actual knowledge of the

> action and judgment, order or proceedings;..."

These expressed purposes of the Rule should not be frustrated or forfeited by an appeal from the trial court's first appealable judgment[2] which has a singularly different purpose--correction of an alleged error committed during trial which has been brought to the trial court's attention. A new procedural Rule is needed for a functional TR. 60(B) where an appeal has been taken from the trial court's judgment.[3]

Several solutions have been adopted by the federal courts. First, the Rule 60(B) movant presents his grounds for relief to the court of appeals, and it decides whether the cause should be remanded for a hearing on the motion. Weiss v. Hunna (2d Cir. 1963), 312 F.2d 711, cert. denied, 83 S.Ct. 1920, 374 U.S. 853, 10 L.Ed. 2d 1073; Zig Zag Spring Co. v. Comfort Spring Corp. (3d Cir. 1953), 200 F.2d 901. Second, the Court of Appeals grants permission to the trial court to hear the Rule 60(B) motion. Dispulse Corp. of America v. Curtis Pub. Co. (2d Cir. 1967), 374 F.2d 442. Third,

if the Rule 60(B) motion is filed with the trial court and it indicates that the motion will be granted, then the movant may make an application to the Court of Appeals for remand of the cause to the trial court. Iannarelli v. Morton (3d Cir. 1972), 463 F.2d 179; Canadian Ingersoll-Rand Co. v. Peterson Prods. of San Mateo, Inc. (9th Cir. 1965), 350 F.2d 18; Aune v. Reynders, (10th Cir. 1965), 344 F.2d 835; Ryan v. U.S.Lines Co., (2d Cir. 1962), 303 F.2d 430; Binks Mfg. Co. v. Ransburg Electro-Coating Corp.(7th Cir. 1960), 281 F.2d 252, cert dismissed, 81 S.Ct. 1091, 366 U.S. 211, 6 L.Ed. 2d 239. Fourth, a Rule 60(B) movant is permitted to appeal from the denial of his motion. The appeal from the original judgment and the denial of the Rule 60(B) motion are considered at the same time and as a single appeal by the court of appeals. Ferrell v. Trailmobile, Inc. (5th Cir. 1955), 223 F.2d 697; Aune v. Reynders, supra; Binks Mfg. Co. v. Ransburg Electro-Coating Corp. supra.

In Ferrell v. Trailmobile, Inc., supra,

223 F.2d at 699, the court suggested the following rationale:

> "...A party who considered himself entitled to relief both under Rule 60(B) and also by appeal, might, on occasion, be required to elect between the two remedies, if appeal deprived the district court of jurisdiction to consider the motion under Rule 60(B). The construction suggested by the Seventh Circuit makes both remedies available, and we think that is the right course. We think, therefore, that this Court has jurisdiction to consider not only the appeal from the original final judgment, but the appeals from the judgment denying relief under Rule 60(B)..."

I would deny the motion to dismiss and consolidate both appeals. Final dispostion of litigation in which a TR. 60(B) motion has been filed would be advanced and the certainty of a forced election avoided.

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1 TR. 60(B) provides in part:
"The motion shall be made within a reasonable time, and for reasons (1),(2),(3) and (4) not more than one (1) year after the judgment, order or proceeding was entered or taken...."

2 TR. 56(C). A summary judgment on less than all the issues. Al see TR. 54.

3 Bright v. State (1972), 259 Ind. 495, 289 N.E.2d 128, is not applicable to a

TR. 60(B) one-year limitation. The purpose for filing post-conviction relief is different from the TR. 60(B) purpose. Secondly, a TR. 60(B) is generally used in civil rather than criminal cases.

IN THE
COURT OF APPEALS OF INDIANA

THIRD DISTRICT

RODNEY A. LOGAL, Plaintiff-Appellant	)	
v.	)	No. 3-774 A 120
WILLIAM C. CRUSE, JERRY W. COOK, BILLY D. MARTIN andRANDALL CZEKAJ,	)	DECIDED SEPTEMBER 29, 1976
Defendants-Appellees	)	NOT FOR PUBLICATION

APPEAL FROM THE PORTER SUPERIOR COURT
Honorable Bruce W. Douglas, Judge

STATON, P.J. MEMORANDUM DECISION

Rodney A. Logal (Logal), plaintiff below, appeals from a dismissal with prejudice under Indiana Trial Rule 37(B)(4). Finding no abuse of discretion, we affirm.

I.

Facts

After considerable strife[1] over the taking of a physician's deposition, one defendant filed a a Motion to Compel Discovery and requested sanc-

tions under Indiana Trial Rule 37. The trial court, at a hearing on this motion (which hearing neither Logal nor his attorney, Owen Crumpacker, attended), found that Logal had, through Crumpacker:

> "...substantially failed to comply with the Indina Rules of Civil Procedure and that said failure has not been in good faith.
> Pursuant to Indiana Trial Rules, the Court does now grant to Defendants, reasonable attorney's fees in the amount of $1,200.00 to be divided among Defendants' counsel by agreement.
> ...
> IT IS FURTHER FOUND AND ORDERED that said $1,200.00 is to be paid into the Clerk's office on or before November 7, 1973 by Plaintiff or Plaintiff's counsel. Should Plaintiff or Plaintiff's counsel fail to comply with said sanctions on or before November 7, 1973, the Court will enter an ORDER OF DISMISSAL in this cause with prejudice and directs (sic) costs against the Plaintiff.
>
> ALL OF WHICH IS SO ORDERED, ADJUDGED AND DECREED by this Court this 26th day of October, 1973.
>
> AND AFTERWARDS, TO-WIT: On the 9th day of November, 1973.
> Plaintiff herein having failed to comply with the sanctions inposed by this Court in the allotted time, the Court does now dismiss this cause with prejudice."

Logal, on December 21, 1973, file a Motion to Vacate and Set Aside the Entry of November 9,

1973, and correct errors. A hearing was held on this motion, March 14, 1974, and evidence and arguments were presented. The court took the matter under advisement and requested that briefs be submitted within two weeks. Logal failed to submit any brief, and on April 9, 1974, the court denied Logal's Motion to Vacate and Motion to Correct Errors.

II.

Sanctions

Trial Rule 37(B) provides in pertinent part:

> (B) Sanctions--Comtempt, damages and default. To avoid abuse of discovery proceedings and to secure enforcement of the discovery provisions of these rules in any enforcement or protective proceedings under the discovery provisions of these rules or upon motion and notice by a party, witness or person to any persons affected thereby:
> ***
> (2) The court may allow expenses, including reasonable attorney's fees, incurred by a party, witness or person, against a party, witness or person, responsible for unexcused conduct that is:
> ***
> (c) in bad faith and abusively resisting or obstructing a deposition,...or any other remedy under the discovery provisions of these rules.
> ***

> (4) The court may enter total or partial judgment by default or dismissal with prejudice against a party who is responsible under subdivision (B)(2) of this rule if the court determines that the party's conduct has or threatens to so delay or obstruct the rights of the opposing party that any other relief would be inadequate...."

In Clark County State Bank v. Bennett (1975) ___Ind. App.___, 336 N.E.2d 663 at 668, Dean Harvey was quoted with reference to what constitutes bad faith under TR. 37. "(B)ad faith' certainly does not contemplate conduct which is deliberate or by design. Far less than that,..." (Emphasis added.) Here, evidence exists which could have supported a finding that Logal's actions were deliberate, thus the money sanction imposed by the trial court was proper under Trial Rule 37(B)(2)(c).

The trial court gave Logal the opportunity to comply with the sanction before it dismissed the cause with prejudice. Even after the order dismissing the cause was entered (two days after the given deadline), the court heard arguments on Logal's Motion to Vacate and offered Logal an opportunity to submit a supporting brief. Logal

did not submit a supporting brief, yet he complains on appeal that the trial court abused its discretion. We do not agree. Rather, from a close reading of the transcript, we conclude that the trial court was tolerant and temperate in its attempts to preserve Logal's rights in the original lawsuit.

Trial Rule 37(B) is an enforcement provision by definition. Dismissal with prejudice is its ultimate tool. The trial court tried to avoid the dismissal. The trial court stated at the Motion to Vacate hearing:

> "I feel very sorry for this Mr. Logal and I really thought that you would probably in some way get this sanction straightened out and I wouldn't have to dismiss the cause.... I don't like to enter sanctions and enter orders like I entered, it puts me on the spot in a way. But these other people have the same rights you have to have the rules followed.... (Logal) can't file a case as the plaintiff and serve everybody and forget it. He has an obligation to diligently prosecute his civil action. He can waive his rights."

This is a correct statement of the law. Farinelli v. Campagna (1975), ___Ind.App.___, 338 N.E.2d 299; Clark County State Bank v. Bennett, supra

There was no abuse of discretion in dismissing the

cause; we affirm.

HOFFMAN, J. and GARRARD, J., Concur.

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[1] It is neigher necessary nor constructive to here delineate the sequence of events which preceded Logal's Motion to Quash the deposition. The Motion to Quash was not sustained, but the taking of the deposition was thwarted.

EXCERPTS FROM
PETITION FOR REHEARING
AND
TRANSFER

The reason said question is claimed to have been decided erroneously is as follows:

A. The effect of the ruling by the Court of Appeals effectively denies the appellant due process of law when in fact there is no showing upon the record that any of the actions complained of are directly attributable to the appellant, Rodney A. Logal.

B. The effect of the ruling by the Court of Appeals denies the appellant, Rodney A. Logal, of due process in that despite the reputation of counsel for the appellant, Rodney A. Logal, and indications upon the record of the lack of knowledge of the appellant, no notices were forwarded to Rodney A. Logal in person nor at any time was an attempt made to notify Rodney A. Logal of the sanctions nd judgment entered against him or the proceedings to determine same.

C. The effect of the ruling of the Court of Appeals is to transfer the liability and sanctions

for the conduct of an appellant's former counsel to the appellant when in fact the actions of appellant's counsel were outside the scope of his employment as set forth in the Code of Professional Responsibility.

****

4. The opinion of the Court of Appeals fails to give a statement in writing of a substantial question arising on the face of the record.

The substantial question claimed to have been avoided is as follows:

****

B. In the alternative, whether or not a trial court may dismiss a party's cause of action without giving the appellant personal, formal notice of such proceedings either by certified main, return receipt requested, or by other means available to the court, to insure that a party has actual knowledge of the proceedings and the ability to provide for the payment of sanctions into court.

****

Identical issues were presented to the Supreme Court on Petition to Transfer.

IN THE
SUPREME COURT OF INDIANA

RODNEY A. LOGAL, Appellant, v. WILLIAM C. CRUSE, JERRY W. COOK, BILLIE D. MARTIN, RANDALL CZEKAJ and WILLIAM J. MAHAN, Appellees.	CONSOLIDATED SUPREME COURT NO. 1077 S 746
RODNEY A. LOGAL, Appellant, v. WILLIAM C. CRUSE, JERRY W. COOK, BILLIE D. MARTIN, RANDALL CZEKAJ and WILLIAM J. MAHAN, Appellees.	DECIDED OCTOBER 13, 1977

ON PETITION TO TRANSFER

DeBruler, J. --

The Porter Superior Court dismissed an action by appellant Logal because of Logal's failure to comply with an order that he make available his

physician for a deposition by the appellee-defendants. Logal filed a motion to correct errors challenging the dismissal as an abuse of discretion. After that motion was overruled he perfected his appeal in cause number 3-774 A 120 in the Court of Appeals.

During the pendency of that appeal, Logal filed with the trial court a motion under Ind. R. Tr. P. 60(B) seeking reinstatement of the suit. This Motion was overruled, resulting in appeal number 3-675 A 106. The Court of Appeals affirmed the judgment of dismissal and dismissed the appeal from the denial of the Rule 60 motion of the grounds that the trial court lost jurisdiction over the matter upon the filing of the initial appeal. The Court of Appeals relied on Bright v. State, (1972) 259 Ind, 495, 289 N. E. 2d 128, in which this Court held that a trial court lacked jurisdiction to entertain a petition under the Post-Conviction Rules while the petitioner's direct appeal was pending.

We have accepted transfer of these appeals, which have been consolidated at appellant's request, in order to clarify the procedure appropriate when an appellant seeks to raise a Trial Rule 60(B) challenge to a judgment against which an appeal has been taken.

I.

Trial Rule 60(B) allows a party to obtain relief from a judgment against him from the trial court, for various enumerated reasons. Most 60(B) grounds must be raised within a year of judgment; all must be raised within a reasonable time.

The Federal Rules of Civil Procedure contain an analogous Rule 60(b). As Judge Staton points ut in his dissent below, the federal courts have developed several alternative procedures for consideration of motions under their Rule 60(b) during the pendency of appeals. Logal v. Cruse, (1975) ___ Ind. App. ___, 338 N.E. 2d 309, 311-12. The procedure enjoying greatest currency among the federal courts calls for an appellant seeking

relief under Rule 60 to file his motion with the district court; if the district court indicates an inclination to grant the motion, the appellant applies to the circuit court of appeals for a remand of the case to the district court for action on the 60(b) motion. See 11 C. WRIGHT and A. MILLER, FEDERAL PRACTICE AND PROCEDURE 2873 at 265-66 (1973).

Significant differences between Indiana and federal civil procedure have convinced this Court to adopt an alternative procedure, employed in a minority of federal courts. See Weiss v. Hunna, (2d Cir. 1963) 312 F 2d. 711, cert. den'd 374 U.S. 853, 83 S. Ct. 1920, 10 L. Ed. 2d 1073. An appeal in most federal cases is initiated by the filing of a notice of appeal, ordinarily required within thirty days of judgment. Fed. R. App. P. 4(a). The district court loses jurisdiction to grant a 60(b) motion upon filing of the notice. Zigzag Spring Co. v. Comfort Spring Corp., (3d Cir. 1953) 200 F.2d 901. The filing of a motion for new trial

under Fed. R. Civ. P. 59 or for judgment n.o.v. under Fed. R. Civ. P. 50 extends the time for filing the notice, but these motions are optional. Thus in federal court the time available for discovery of 60(b) grounds will ordinarily be limited to thirty days.

In our courts, in contrast, any party wishing to appeal must file a motion to correct errors within sixty days of judgment. Ind. R. Tr. P. 59(C) and (G). After denial of the motion the appellant has a total of ninety days to file the record with the appellate court. Ind. R. App. P. 3(B). Not until the record is filed does the trial court lose jurisdiction. Bright v. State, supra. Thus not until 150 days after judgment exclusive of the time during which the motion to correct errors is under consideration, see Ind. R. Tr. P. 53.1(A), is the trial court ordinarily divested of its jurisdiction. Trial Rule 59 allows inclusion of the grounds for relief enumerated in Rule 60(B)(1) to (3), all of which are subject to the one-year limitation, in

the motion to correct errors. Ind. R. Tr. P. 59(A). Rule 60 (B) requires motions thereunder to be filed ithin a reasonable time, which may be less than one year, and our Court of Appeals has held that only grounds which could not have been included in the motion to correct errors can be advanced in a Rule 60(B) motion. Warner v. Young America Fire Dept., (1975) ____Ind. App. ___, 326 NE.2d 831. It appears from this collation of rules that in Indiana courts a party has a significantly longer time to present Rule 60(B) grounds to the trial court than his counterpart in federal court, and that meritorious motions for relief from judgment during the pendency of an appeal from that judgment are likely to be less frequent in our system.

Therefore we adopt the following procedure for disposition of 60(B) motions while the judgment is on appeal.

(1) The moving party files with the appellate court an application for leave to file his 60(B) motion. This application should be verified and

should set forth the grounds relied upon in a specific and non-conclusory manner.

(2) The appellate court will make a preliminary determination of the merits of the movant's 60(B) grounds. In so doing the appellate court will determine whether, accepting appellant's specific, non-conclusory factual allegations as true, there is a substantial likelihood that the trial court would grant the relief sought. Inasmuch as an appellate court is not an appropriate tribunal for the resolution of factual issues, the opposing party will not be allowed to dispute the movant's factual allegations in the appellate court.

(3) If the appellate court determines that the motion has sufficient merit, as described in the preceding paragraph, it will remand the entire case to the trial court for plenary consideration of the 60(B) grounds. Such remand order will terminate the appeal and the costs in the appellate court will be ordered taxed against the party procuring the

remand. The decision to remand does not require the trial court to grant the motion. Caribou Four Corner, Inc. v. Truck Ins. Exchange, (10th Cir. 971) 443 F.2d 796. If the trial court denies the otion, the movant should file a motion to correct errors addressed to this denial, Hooker v. Terre Haute Gas Corp., (1974) ___Ind.___, 317 N.E.2d 878, and appeal the denial. In this new appeal any of the issues raised in the original appeal may be incorporated, without being included in the second motion to correct errors.

(4) If the trial court grants the motion, the opposing party may appeal that ruling under the same terms as described in paragraph (3). The original appeal shall be deemed moot.

(5) If the appellate court denies the application for remand, that ruling may be assigned as grounds for rehearing and, where appropriate, transfer.

We believe that this procedure will allow full and fair consideration of grounds for relief from judgment with a minimum of disruptions of the ap-

pellate process. For purposes of illustration and in the interests of fairness, we will consider Logal's 60(B) motion as though it were an application made in accordance with the procedure outlined today.

II.

Logal's action was dismissed as a sanction for non-compliance with a discovery order. Logal had been ordered to produce his physician for deposition; neither Logal, his attorney, or physician appeared. The trial court ordered Logal to pay $1,200 in costs to the defendants, whose attorneys had appeared for the deposition with a court reporter. When the costs were not paid, the trial court dismissed the action pursuant to Ind. R. Tr. P. 37(B)(4).

Logal asserts that he was not personally served with the order and therefore had no notice of the impending dismissal. He does not deny that his attorney received such notice. Indiana R. Tr. P. 5 provides:

"Whenever a party is represented by an attorney of record, service shall be made upon such attorney...."

Service upon an attorney of record constitutes notice to the party represented. State ex rel. Brubaker v. Pritchard, (1956) 236 Ind. 222, 138 N.E.2d 233, 60 A.L.R. 1239. Therefore, accepting Logal's assertions as true, we find no substantial likelihood of success in his advanced grounds for relief.

III.

In cause 3-675 A 106, Logal contends that the trial court abused its discretion in dismissing his action. We cannot agree. The trial court was aced with unexcused disregard of its discovery orders, and imposed the maximum sanction authorized by our Rules. Indiana R. Tr. P. 37 provides for this sanction when "the court determines that the party's conduct has or threatens to so delay or obstruct the rights of the opposing party that any other relief would be inadequate." We cannot say that a conclusion to this effect by the trial court

is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." State ex rel. Steers v. Holovachka, (1957) 236 Ind. 565, 575, 142 N. E. 2d 593, 597; McFarlan v. Fowler Bank & City Trust Co. (1938) 214 Ind. 10, 14, 12 N.E.2d 752, 754,

Appeals 3-774 A 120 and 3-675 A 106 are transferred to this Court. The judgments of the Porter Superior Court dismissing this action and denying appellant's motion for relief from the judgment are affirmed.

Prentice and Pivarnik, JJ., concur; Givan, C.J., concurs in result; Hunter, J., concurs in part and dissents in part with opinion.

HUNTER, J. - Concurring in part, dissenting in part.

I concur with the majority opinion that the taking of an appeal should not preclude a party from pursuing its remedies under Ind. R. Tr. P. 60(B) however, I am in disagreement as to the procedure

to be followed. In selecting the particular method that it did, the majority chooses to reject a procedure used by a majority of the federal courts for one that has been referred to as an anomaly by legal commentators. (WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE 2878 at 263-264.)

The procedure which I would adopt is similar to that followed in the majority of the federal courts:

1. The movant would file a motion for relief with the trial court. Simultaneously a certified copy is sent to the Court of appellate jurisdiction. Upon receipt of that motion, the appeal is held in abeyance and further jurisdiction in the pending matter is extended to the trial court as a fact-finder.

2. Notification by the trial court of its determination.

(a) If the trial court intends to grant the motion, it notifies the court of appellate

jurisdiction which would remand the appeal to the trial court for granting.

(b) If the trial court determines to deny the motion, it may do so without remand from the motion, it may do so without remand from the court of appellate jurisdiction. If the moving party desires, it may appeal the denial of its motion and said ruling is merged into the appeal on the merits.

The above procedure has been recognized as promoting true judicial economy. See: HARVEY, RULES AND RULINGS FOR THE TRIAL LAWYER, 18 RES GESTAE 21 (November 1974); Washington v. Board of Education School District 89, (7th Cir. 1974); 498 F.2d 11; Wright, supra, Ryan v. U.S.Lines Co., (C.A.2d, 1962) 303 F2d 430, 434. It eliminates the further burdening of the appellate system with a preliminary review before remanding to the trial court for a ruling on the merits of the motion. This duplication of judicial effort is both unecessary and undesirable.

I would therefore grant transfer and adopt the procedure set forth in this opinion.